SUPREME COURT, U. S.

FEB 16 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,
Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
STATE CORRECTIONAL INSTITUTION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

LINDLEY R. McCLELLAND,
District Attorney of Erie County, Pennsylvania,

WILLIAM E. PFADT,
Assistant District Attorney of Erie County, Pennsylvania,

Attorneys for the Commonwealth of Pennsylvania.

Erie County Court House,
Erie, Pennsylvania.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5033 CARLTON DRIVE, PITTSBURGH, PA., 15236
412-881-7463

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Counter Statements of Questions Presented	2
Statute Involved	2
Statement	2
I. History	2
II. *Habeas Corpus* Proceedings	5
Summary of Argument	6
Argument	7
I. The action of the Court of Appeals in denying petitioner's petition did not constitute discrimination against an indigent defendant	7
A. It is admitted that any procedural device for screening appeals by indigents is invalid if it impinges upon the right of the litigant to equal consideration before the Courts	9
B. The Court of Appeals has applied the provisions of 28 U. S. C. 1915 precisely and indigents are not denied the same rights of appeal as are afforded to men of means	10
II. The issues raised by petitioner could properly be determined to be frivolous without further briefing and oral argument, despite the fact that the District Court has issued a certificate of probable cause	11
A. The claim of denial by a state of the effective assistance of counsel can properly be raised in a federal *habeas corpus* proceeding	11
B. The arguments concerning effective aid of counsel raised by petitioner were present-	

PAGE

ed at the time of hearing before the District Court 13

CONCLUSION. For the reasons stated the orders of the Court of Appeals should be sustained 15

TABLE OF CASES.

Burwell, Application of, 76 S. Ct. 539, 350 U. S. 521 .. 9
Commonwealth of Pennsylvania *ex rel.* Nowakowski vs. Maroney, 194 Pa. Super. 24, 166 A. 2d 559 ....5, 14
Coppedge v. U. S., 369 U. S. 438 .....10, 11
Douglas v. California, 372 U. S. 353 .....10, 11
Draper v. Washington, 372 U. S. 487 .....10, 11
Egan v. Teets, 251 F. 2d 571, 575 .....7, 13
Ellis v. U. S., 356 U S. 674, 675 11
Forsythe v. State of Ohio, 33 F. 2d 678 8
Gray v. Johnson, 354 F. 2d 986, cert. denied 865 S. Ct. 1232 .....9, 12
Griffin v. Illinois, 351 U. S. 12 .....6, 9, 11
Johnson v. U. S., 352 U. S. 565 11
Kremer v. Clarke, 285 F. 2d 735, cert. denied 81 S. Ct. 1098 8
Lane v. Brown, 372 U. S. 477 .....10, 11
Murray v. State of Louisiana, 347 F. 2d 825 12
Root v. Cunningham, 344 F. 2d 1, cert. denied 865 S. Ct. 135 .....9, 12
Shorten v. Markley, 330 F. 2d 102 8
Thomas v. Duffy, 191 F. 2d 360, 361 13
U. S. v. Visconti, 261 F. 2d 215, cert. denied 79 S. Ct. 743 8
Young v. U. S., 267 F. 2d 692 8
Young v. Wainwright, 326 F. 2d 325 9

STATUTES.

28 U. S. C. 1254(1) 2
28 U. S. C. 1915 .....2, 6, 7, 10, 11
Subsection (d) 2
28 U. S. C. 1291 6

IN THE

Supreme Court of the United States

October Term, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,

Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
STATE CORRECTIONAL INSTITUTION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

Opinion Below

The orders of the Court of Appeals for the Third Circuit are not reported but appear as part of the Record (R. 135, 140). The prior opinion of the District Court for the Western District of Pennsylvania also appears in the Record (R. 115).

Jurisdiction

The order of the Court of Appeals for the Third Circuit was entered on October 4, 1965 (R. 140). A petition for

writ of certiorari was filed on January 4, 1966, and was granted on June 13, 1966 (R. 141; ___ U. S. ___). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Counter Statements of Questions Presented

1. Whether on application for leave to appeal *in forma pauperis*, the Court of Appeals could deny a criminal defendant leave to appeal *in forma pauperis* and refuse to appoint counsel even though the District Court Judge had issued a certificate of probable cause, without abusing the discretion vested in it under Section 1915 of Title 28 U. S. C.

2. Whether the Court of Appeals acted with good cause and with sound discretion in determining that the questions presented in collateral attack proceedings were so frivolous as to justify a denial of defendant's petitions without assignment of counsel or hearing.

Statute Involved

Section 1915 of Title 28 U. S. C. is the pertinent statute involved in this case. Particularly, subsection (d) is most relevant. This subsection provides:

(a) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Statement

I. History

Edward John Nowakowski, then age 27, was arrested on July 13, 1957, charged with burglary of a tavern in the City of Erie, which had occurred the night before. At a

preliminary hearing before an Alderman, his accomplice, Douglas Smith, pleaded guilty and testified against Nowakowski. Nowakowski was lodged in the Erie County Jail until the date of trial, September 11th and 12th, 1957. The record does not show that he was deprived of his rights to have visitors or to write letters. Counsel was appointed for this man, at his request, some time before the date of trial and counsel interviewed the defendant and prepared his defense, this despite the fact that counsel did not enter his appearance on behalf of defendant until the date of trial, September 11, 1957.

At the trial, Douglas Smith, the accomplice, changed his story and testified that Nowakowski did not commit the crime of burglary. Nowakowski was convicted and sentenced on September 16, 1957 to serve a term of 3 to 7 years for the crime of Burglary, Larceny and Receiving Stolen Goods. At the time of this offense Nowakowski was on parole because of a prior crime and the balance of that parole time had to be served before the sentence imposed on September 16, 1957 would begin.

While confined in the Erie County Jail awaiting transfer to the Western Diagnostic and Classification Center. Nowakowski escaped from the County Jail on September 19, 1957. He was returned from the escape on February 11, 1958 and sentenced by the Court of Quarter Sessions of Erie County at No. 74 February Sessions, 1958 to serve a term of 4 to 10 years for Prison Breach.

On February 12, 1958, Nowakowski was received into the Western Diagnostic and Classification Center to begin serving back-time as a parole violator. The sentences imposed by the Erie County Court were entered on the record as detainers, consecutive with each other according to the

terms set down by the Court, and to follow his back-time for parole violation.

Back-time for parole violations was completed on February 8, 1960 and Nowakowski was entered into the Western Diagnostic and Classification Center to begin serving the sentence of 3 to 7 years imposed by the Erie County Court for Burglary, Larceny and Receiving Stolen Goods. The records of the Center show that this sentence, to be effective from December 6, 1959 and that the minimum term expired on December 6, 1962. The maximum term would have expired on December 6, 1966.

While serving the sentence of 3 to 7 years, the said Edward John Nowakowski was taken to Allegheny County and on March 26, 1963 he was sentenced by the Court of Quarter Sessions of Allegheny County at No. 334 November Sessions, 1962 to serve 2½ to 5 years for Assault by Prisoner.

On June 4, 1964 by order of the Pennsylvania Board of Parole, Nowakowski was granted parole on the 3 to 7 year sentence and entered into the Western Diagnostic and Classification Center to begin serving the 4 to 10 year term imposed on him for Prison Breach. The records of the Center show this sentence to be effective from May 21, 1964 and that the minimum term will expire on May 21, 1968 and the maximum term on May 21, 1974.

The sentence of 2½ to 5 years imposed for Assault by Prisoner is recorded as a detainer and is to begin at the expiration of his 4 to 10 year sentence, presently being served at the State Correctional Institution at Pittsburgh, Pennsylvania.

II. *Habeas Corpus* Proceedings

Edward John Nowakowski began to file Petitions for Writ of *Habeas Corpus* to the Court of Common Pleas of Erie County, Pennsylvania, in 1959, at No. 212 May Term 1959. There followed additional petitions at 575 September Term 1959, 376 May Term 1960, 83 May Term 1962 and 420 September Term 1963. The next proceeding was taken to the Superior Court of Pennsylvania (Commonwealth of Pennsylvania *ex rel.* Nowakowski vs. Maroney, 194 Pa. Super. 24, 166 A. 2d 559). An appeal to the Supreme Court of Pennsylvania from a denial of a subsequent *habeas corpus* petition was denied. A petition was filed in the District Court of the United States for the Western District of Pennsylvania at No. 64-364, which was followed by another petition to the District Court at Civil No. 64-1087. In this proceeding, for the first time, Nowakowski was granted a hearing on his petition and a full evidentiary hearing was held with the assistance of counsel appointed by the Court. The order of United States District Judge Rabe F. Marsh, dated April 28, 1965, denying the petition for writ of *habeas corpus* appears in the record at R. 115. The opinion of Judge Marsh also contains a review of the various petitions for writ of *habeas corpus* filed by Nowakowski up to that date.

There followed an application for a re-hearing before the District Court which was denied on May 14, 1965 (R. 127).

Petitioner then applied for a certificate of probable cause to the District Court and this was issued on June 15, 1965 (R. 129). On the same day, petitioner filed Notice of Appeal to the Court of Appeals for the Third Circuit (R. 130). On July 19, 1965, petitioner, *pro se*, petitioned the Court of Appeals for an order granting him leave to ap-

peal *in forma pauperis*, that his cause be docketed without payment of costs or giving of security, that counsel be appointed and that he be given leave to proceed on hand written briefs. The Court of Appeals denied this petition (R. 135) and a subsequent petition for re-hearing was denied on October 4, 1965 (R. 140).

Summary of Argument

I.

The case of *Griffin v. Illinois*, 351 U. S. 12, does not apply to the instant case. The action by the Court of Appeals was clearly proper under the circumstances and was in no way based upon petitioner's indigent status. If the Court had ruled otherwise, in view of the long history of petitions for writ of *habeas corpus* filed by petitioner, one would be shocked.

Under the provisions of 28 U. S. C. 1915, the Court of Appeals may dismiss a case if satisfied that the action is frivolous or malicious. The Court has the authority to and actually does this whether or not the petitioner is represented by counsel, and the fact that they acted within the scope of their authority does not mean they were wrong in this case just because the petitioner was indigent. The statutory right to appeal under 28 U. S. C. 1291 from the denial of a writ of *habeas corpus* did not depend in this case upon the financial means of the petitioner and it is presumptious to contend that petitioner's appeal was turned down just because he was an indigent. It would be almost as unrelated to say that the petition was refused because petitioner's name was Nowakowski.

II.

It is not denied by petitioner that the Court of Appeals does have the right to exercise discretion under 28 U. S. C. 1915, and the fact that a certificate of probable cause may be issued does not deprive the Court of Appeals from exercising such discretion. The certificate of probable cause is a condition precedent to the right to appeal and does not constitute an adjudication of anything. *Egan v. Teets*, 251 F. 2d 571, 575.

It is mere conjecture to argue that a different result would have come about if the District Court had not issued a certificate of probable cause. Any number of possibilities may have occurred and not necessarily would the Court of Appeals have been obliged to appoint counsel for the petitioner and allow a full hearing on the question of petitioner's good faith.

ARGUMENT

I.

The action of the Court of Appeals in denying petitioner's petition did not constitute discrimination against an indigent defendant.

The Court of Appeals had before it the petition prepared by Nowakowski. Available to them also, was the opinion of Judge Marsh in the District Court (R. 115). A scrutiny of these documents would justify, in fact demand, a finding that no additional information upon which a sound judgment could be made, would be produced by further argument or further hearing. At this point, the Court of Appeals, with the materials they had before them could very reasonably decide that the petitioner's action was frivolous, therefore justifying dismissal. The fact that a certi-

ficate of probable cause had been issued by the judge of the District Court would not and should not have had any influence on the Court of Appeals. The only purpose served by that certificate was that it was necessary to allow the matter to reach review by the Court of Appeals.

The fact that petitioner believes or is even convinced in his own mind that his arguments are worthy of belief would not prevent a finding by the Court that his appeal is utterly frivolous. *U. S. v. Visconti*, 261 F. 2d 215, cert. denied 79 S. Ct. 743.

Should the Court of Appeals have granted the prayer of the Nowakowski petition just because of the indigent status of the petitioner even though they may have honestly felt that the appeal was frivolous?

In *Kremer v. Clarke*, 285 F. 2d 735, cert. denied 81 S. Ct. 1098, the court said, "Leave to appeal *in forma pauperis* should not be granted if appeal would be dismissed regardless of *pauperous* condition of appellant." The presumption should be that the decision of the Court of Appeals, in the instant case was in accord with this opinion.

Frivolousness is a ground for dismissing an appeal in *forma pauperis* and also a prepaid appeal. *Young v. U. S.* 267 F. 2d 692.

Because U. S. Court of Appeals was satisfied that the various papers of state prisoner before it presented nothing calling for relief by court, it would not indulge in idle gesture of appointing counsel. *Forsythe v. State of Ohio*, 33 F. 2d 678. *Shorten v. Markley*, 330 F. 2d 102.

Court of Appeals need only determine if there is substantial evidence in record to support denial of *habeas*

corpus below. *Gray v. Johnson,* 354 F. 2d 986, cert. denied 865 S. Ct. 1232.

Court of Appeals was bound by district judge's findings and conclusions which had ample factual and legal support in *habeas corpus* proceeding. *Root v. Cunningham,* 344 F. 2d 1, cert. denied 865 S. Ct. 135.

In passing upon propriety of district court's refusal to accord state prisoner *habeas corpus* relief, Court of Appeals will review no more than the issue passed upon by the lower court. *Young v. Wainwright,* 326 F. 2d 325.

It is not for the Supreme Court to prescribe how the discretion vested in a Court of Appeals acting under this section, providing appeal from final order of circuit or district judge in *habeas corpus* proceeding, should be exercised. *Application of Burwell,* 76 S. Ct. 539, 350 U. S. 521.

These citations clearly set forth the authority vested in the Court of Appeals in a matter such as the case at bar. The spirit as well as the letter of the law granting discretion to the Court of Appeals is evident throughout these and many other reported cases. The exercise of such discretion is always necessary in these cases to a lesser or greater extent and it should be only on evidence of the most flagrant abuse that such a discretionary finding be overruled.

A. It is admitted that any procedural device for screening appeals by indigents is invalid if it impinges upon the right of the litigant to equal consideration before the Courts.

The cases cited by petitioner all refer to the right of an indigent defendant to an adequate appellate review of a criminal conviction. *Griffin v. Illinois,* 351 U. S. 12,

Lane v. Brown, 372 U. S. 477, *Draper v. Washington*, 372 U. S. 487 and *Douglas v. California*, 372 U. S. 353.

In the present case petitioner had adequate opportunity for appeal and had actually filed a motion for a new trial which was refused. In addition, the five petitions to the Court of Common Pleas of Erie County, appeal to the Superior Court of Pennsylvania, appeal to the Supreme Court of Pennsylvania and two separate petitions to the District Court of the United States, one of which involved a full evidentiary hearing at which petitioner was represented by Court appointed counsel, certainly afforded review of defendant's conviction.

The position of Nowakowski before this Court cannot be compared with the position of the petitioner's in the cases cited above where state procedures hindering appeal were involved. If the State of Pennsylvania had imposed rules which made it more difficult for the petitioner to appeal his conviction then the authorities cited would be in point. There is no claim that Pennsylvania denied Nowakowski, he being indigent, an adequate appellate review of his criminal conviction.

B. The Court of Appeals has applied the provisions of 28 U. S. C. 1915 precisely and indigents are not denied the same rights of appeal as are afforded to men of means.

An appeal from a conviction before a District Court must be allowed as a matter of right. In *Coppedge v. U. S.*, 369 U. S. 438, the petitioner was convicted in the District Court and his application for leave to appeal to the Court of Appeals was denied. There, it was the ruling of this Court, "We hold petitioner has not yet received the benefits of presenting either oral arguments or full briefs on the merits of his claim to the court first charged with the

supervision of the trial Court." Thus, can be seen the analogy between *Coppedge* and the *Griffin, Lane v. Brown, Draper* and *Douglas* cases cited previously, in all of which cases the right to appeal to the "court first charged with the supervision of the trial Court" was said to be a matter of right not to be denied an indigent appellant.

There has been no adequate showing that an indigent petitioner would not receive the same consideration under 28 U. S. C. 1915 as a paying petitioner would receive. *Johnson v. U. S.*, 352 U. S. 565 and *Ellis v. U. S.*, 356 U. S. 674, 675 both provide that an appeal *in forma pauperis* must be allowed in a criminal case, "*unless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant.*" This language certainly does not mean that the procedures set forth in 28 U. S. C. 1915 are discriminatory against indigents, and no question as to the constitutionality of this section of the Code has ever been raised in opinions of the Supreme Court.

II.

The issues raised by petitioner could properly be determined to be frivolous without further briefing and oral argument, despite the fact that the District Court had issued a certificate of probable cause.

The issue before the District Court was the question of whether or not petitioner had been denied the effective aid and assistance of counsel at the time of his trial before the state court.

A. The claim of denial by a state of the effective assistance of counsel can properly be raised in a federal *habeas corpus* proceeding.

The issue of effective representation by counsel at the time of trial was a proper question submitted to the Dis-

trict Court on petitioner's petition for writ of *habeas corpus*. This was the sole question involved in the amended petition which was filed and upon which the District Court held a full hearing. Petitioner was represented by counsel at this hearing appointed by the District Court. The record of that hearing (R. .) is before this Court.

A review of the record before the District Court raises the strong conclusion that no further testimony or available evidence and no additional argument on behalf of petitioner would strengthen petitioner's case. What more could be said in petitioner's behalf in support of his petition? This record was before the Court of Appeals and could constitute such sufficient substantial evidence as to dismiss the petition of Nowakowski. In *Gray v. Johnson*, 354 F. 2d 986, cert. denied 86 S. Ct. 1232, it was held, "Court of Appeals need only determine if there is substantial evidence in record to support denial of *habeas corpus* below." And in *Root v. Cunningham*, 344 F. 2d 1, cert. denied 86 S. Ct. 135, the court ruled, "Court of Appeals was bound by District Judge's findings and conclusions which had ample factual and legal support in *habeas corpus* proceeding."

It is stated in the opinion, *Murray v. State of Louisiana*, 347 F. 2d 825, "Court of Appeals on appeal from denial of federal *habeas corpus* relief, could take judicial notice of prior state petitions filed by petitioner.

The Court of Appeals in the instant case had adequate information before them to justify dismissal of the Nowakowski petition. As stated previously, the fact that a certificate of probable cause had been issued by the District Court Judge did not become a matter of evidence before the Court of Appeals. This certificate was a requirement of appeal and served that purpose only. The reasons

why a certificate of probable cause may have been granted by the District Judge are not an adjudication of anything. *Egan v. Teets,* 251 F. 2d 571, 575; and are not authoritative, *Thomas v. Duffy,* 191 F. 2d 360, 361.

B. The arguments concerning effective aid of counsel raised by petitioner were presented at the time of hearing before the District Court.

The record of the proceeding before Judge Marsh (R.) fully sets forth the allegations of petitioner that he was not effectively represented by counsel at his trial in the state court. Yet it is interesting, as pointed out by Judge Marsh (R.), that petitioner complimented his court appointed attorney on his handling of the trial and, as further stated, "It is evident that relator was in fact well satisfied with Mr. Morgan's efforts at the trial because in his first two petitions for the writ, presented in the state court in 1959, he did not express any dissatisfaction with Mr. Mangan's services at the trial.

The District Court opinion, goes on (R.) "In two state court petitions for the writ, No. 575 September Term, 1959 (petition Ex. E. p. 24) and No. 83 May Term, 1962 (petition, Ex. F. p. 70), relator stated that he "and his counsel made lots of efforts to try to locate said witness (Mrs. Servidio) which would prove that petitioner could not possible committed said crime; but could not until after the trial (*sic*)."

In the third petition filed in the Court of Common Pleas of Erie County by petitioner, Judge Samuel J. Roberts, who had presided at the trial and who is now a Justice of the Supreme Court of Pennsylvania, stated (R.) "This contention is unsupported by the record and without merit. An examination of the record indicates clearly that he was

adequately and competently represented by alert counsel throughout the entire trial * * *.

Our review of the record satisfied us again that petitioner had a fair and impartial trial upon the merits, that he was properly represented by competent counsel during all phases of the trial and that the jury returned a proper verdict." This decision was affirmed by the Superior Court of Pennsylvania upon the opinion of the trial judge. *Commonwealth ex rel. Nowakowski v. Maroney,* 194 Pa. Super. 24, 166 A. 2d 559.

An appraisal of the evidence concerning the manner in which the attorney representing the petitioner at the time of trial, conducted himself is set forth on pages 6, 7, 8 and 9 of Judge Marsh's opinion (R.). No further argument need be advanced regarding the effectiveness and competency of Attorney Mangan's defense of Nowakowski at the trial in the state court. The trial judge and the Federal District Court Judge who presided at a full hearing and heard arguments concerning the charge of ineffective and incompetent counsel, have made their views a matter of record, part of the record before this Court and it is submitted that these opinions are more than adequate to rebut the arguments of petitioner's counsel in his attempt to show that Nowakowski had and has a valid argument for a writ of *habeas corpus* and that the Court of Appeals should not have dismissed his petition as being frivolous.

CONCLUSION

For the reasons stated the orders of the Court of Appeals should be sustained.

Respectfully submitted,

LINDLEY R. McCLELLAND,
District Attorney,

WILLIAM E. PFADT,
Assistant District Attorney,

Attorneys for the Commonwealth of Pennsylvania,

February, 1967.